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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-499

PEOPLE OF THE STATE OF NEW YORK,

Appellee,

—v.—

JOSEPH TREMARCO,

Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Comes now Michael J. Gillen, attorney for the petitioner, and hereby petitions for a writ of certiorari to review the judgment of the Court of Appeals for the State of New York in this case, entered June 29, 1972.

Opinions Below

The New York Court of Appeals denied leave to appeal. The Appellate Division, Second Department, affirmed conviction without opinion. The trial court rendered no written opinion.

Jurisdiction

Denial of leave to appeal constituted an affirmation of petitioner's conviction by the New York Court of Appeals, a determination by the highest state court in which a deci-

sion could be had was entered June 29, 1972. This petition is filed within ninety (90) days of the date of entry of judgment of the Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 1257(3), petitioner claiming rights, privileges, and immunities under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

Constitutional Provisions Involved

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property to be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Questions Presented

1. Whether a Trial Court, absent a showing that the material sought is unrelated to the gravamen of the case on trial, can refuse to compel production of subpoenaed records without even an in-camera inspection and sealing of the records for appellate review?

2. Whether it is permissible for the United States Attorney General to make a conclusive determination not to produce records and whether his subordinates in accordance with the order may lawfully decline to produce them in response to a subpoena duces tecum?

3. Whether an In-Court Identification should have been excluded when petitioner had previously been exhibited alone in handcuffs to the identifying witness one day after the witness was assaulted, the witness having testified he viewed his assailant for "no more than a second"?

4. Whether it is permissible for a prosecutor to make statements, calculated to prejudice the jury, not founded in evidence and without any basis in fact in the record?

Statement

Hearing on Motion to Suppress

People's Case

Harry Bogin, the victim of the assault herein, testified that on March 11, 1971, he left his home at 2783 Brighton 8th Street, Brooklyn, N.Y., about 7 a.m. and walked across the street where he noticed his company's truck had a flat tire. He walked to the rear of the truck, stepped onto the sidewalk and saw a man emerge from car parked in front of the truck with "what look[ed] to me like a machine gun". He got a full view of the man for "no more than a second" before turning and starting to run. He recognized the man as the same person he had seen in Federal Court in New Jersey. He heard firing and the next thing he knew he was lying on the ground across the street (H. 52-55).* The next day the prosecutor entered his hospital room at Coney Island Hospital and told him that he (the prosecutor) was "bringing in someone that (he) would like me to look at". Two people then entered the hospital room with the petitioner, Tremarco, who Bogin identified as the man who shot him. He was also shown photographs of many people but could not recall whether the photos were shown to him before or after Tremarco was brought into the hospital room. Then he recognized four or five of the people depicted in the photographs and one of those people

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* Reference key: A. Appendix; H. Hearing before trial; T. Trial record.

was the petitioner. He also testified that after the shooting he had told his wife that "I was shot by Tremarco" H. 62-64).

On cross-examination, Bogin testified that he had no recollection of the weather conditions on March 11, 1971 (H. 73) but that to the best of his knowledge, because he was "not fully awake" it was not raining and there was no smoke, fog or haze (H. 74). A meteorologist testified that based upon the U.S. Weather Bureau reports it was raining, complete overcast with fog and haze (T. 134 to 142). That when he first saw the man coming out of the car he did not recognize him as the petitioner (H. 76) and as the man started to turn towards him he noticed the weapon in his hand (H. 77) and the man's face for under a second (H. 90). That within that second he recognized the weapon as a Thompson submachine gun, saw the man's face and ran (H. 142).

He also testified that he first saw petitioner in the latter part of 1969 or the early part of 1970, in a courtroom in New Jersey (H. 79). At that time he saw Tremarco full face when he turned around in the courtroom (H. 86) for "probably about a couple of seconds, maybe less" (H. 87). Thereafter, Bogin went to a room to be fingerprinted where he remained for approximately 25 minutes. Tremarco was with him during this time but Bogin had his own problems and was not looking at Tremarco during the entire period (H. 89). Bogin also admitted that he was shown photographs "possibly two or three times" in the hospital (H. 122) and that he picked out Tremarco *and another picture that had a likeness to Tremarco* (H. 124). When Tremarco entered his hospital room with two other men, petitioner had *handcuffs on and* that *he expected the man who shot him to be brought in at*

that time (H. 127). While in the hospital he was conscious but "not fully aware of who I was speaking to" (H. 131). He did not know how long he was awake in the hospital prior to petitioner's being brought in (H. 136).

Gerald Collins, an FBI Agent testified on direct that on March 12, 1971, at approximately 8 a.m. he went to the Newark Police Department to pick up petitioner, for arraignment on a warrant issued in the Eastern District of New York for obstruction of justice arising out of the shooting of Bogin. After arraigning Tremarco in Federal Court in Brooklyn, New York, Agent Collins went to the Coney Island Hospital where he saw Bogin. He showed Bogin 48 photographs and Bogin identified the picture of Joseph Tremarco stating "that's him". Bogin also identified a picture of Tremarco's brother and another individual stating "I can't be sure, I think I have seen this man before" (H. 168-171).

Petitioner had served subpoenaes duces tecum upon the FBI and the United States Attorney's Office for the Eastern District of New York, demanding the production of the statements of the witness Harry Bogin, to the Agents of the FBI. Assistant United States Attorney Rosenthal, appeared before the trial court and moved to quash petitioner's subpoenaes, citing as authority § 16.11 of the Code of Federal Regulations. Mr. Rosenthal refused to produce even the limited information sought by the petitioner. The Trial Court refused to compel the production of the subpoenaed records and quashed the subpoenas (H. 13-22).

Agent Collins stated that he made a report concerning the events he testified to on direct but he refused to disclose that report, claiming that the report contained information

pertinent to other matters. Agent Collins refused to submit his reports to any authority, including the Court (H. 224). An exception was taken to the Court refusal to order the production of that report (H. 173). He testified that the photographs were displayed to Bogin, prior to Tremarco being brought into the room about one hour thereafter (H. 181-182).

Agent Charles Steadman of the FBI also testified as to the existence of FBI reports concerning the matter under inquiry. He also stated he would not turn over such reports even to the Court (H. 38).

Agent Collins denied having obtained the Federal warrant to assist the state in getting Tremarco from New Jersey to New York, but he admitted that he never experienced a situation where a man is arrested in one state and brought to another state to be arraigned. He also stated that when Tremarco was released without bail, he was immediately taken into custody by New York City Detectives (H. 205-211).

Raymond Bini, a New York City Patrolman testified that on March 11, 1971, he went to 2883 Brighton Eighth Street (H. 225) and spoke with Bogin who said "John Tremarco" shot him (H. 226). Thereafter the defense introduced into evidence (H. 383) Patrolman Bini's report in which he stated that an "unknown person" shot Bogin (H. 328).

Mark Steinberg testified that after the shooting Bogin said that the name of the man who shot him was "Joe Tommico" "Tinio" "Tremarco" (H. 237).

Edward Boyd, V, an Assistant U. S. Attorney for the Eastern District of New York testified that on March 12,

1971, Joseph Tremarco was arraigned in Federal Court in Brooklyn and released on his own recognizance. That although bail is usually requested on a charge of shooting a Federal witness it was not requested in this instance because the Federal jails were crowded and it was known that the New York City Police Department would arrest Tremarco and that the New York City Police were waiting in the magistrate's office when the defendant was brought in for arraignment (H. 294-298).

Irwin Nacht a New York City Detective testified that Bogin told him at Coney Island Hospital that "John Tremarco" shot him. Detective Nacht also testified that Bogin told him that he believed that he would recover (H. 323).

On cross-examination Detective Nacht testified that an FBI agent told him that Tremarco would be in Federal Court in Brooklyn on March 12, 1971 (H. 341). He arrived in Brooklyn Federal Court at approximately 9 p.m. on March 12, hoping to pick up Tremarco (H. 346). He was aware that Tremarco was represented by Mr. Brown, an attorney (H. 348). After Tremarco's arraignment in Federal Court he arrested him (H. 349). He told Mr. Brown that Tremarco would be arraigned in New York City Criminal Court as soon as possible (H. 350). Instead he then accompanied Tremarco to Coney Island Hospital (H. 353) arriving there at approximately 1:30 p.m. (H. 355) and that the showup took place at approximately 4 p.m. (H. 356). He stated that photographs were shown to Bogin immediately prior to the showup (H. 362). Defense counsel was not present at the photo identification or the showup and the petitioner was not advised that he had a right to have an attorney present (H. 365-366).

Defendant's Case on the Hearing

Raymond Brown testified on direct that he is an attorney admitted to practice in the State of New Jersey and in the New York and New Jersey Federal Courts. On March 12, 1971, another lawyer requested that he represent Mr. Tremarco. He then went to Newark Police Headquarters where he had learned that Tremarco was being held and was informed Tremarco was being taken by Federal Authorities to be arraigned. He then went to the United States Commissioner's office in Newark where Judge Schweitzer advised him, after making a telephone call, that Tremarco was being taken directly to Brooklyn, rather than being arraigned in Newark. He then went to the United States Commissioner's office in Brooklyn where he met Assistant United States Attorney Boyd. Mr. Boyd told him that Tremarco was being turned over to the state district attorney and introduced him to Assistant District Attorney Davenport. He asked Mr. Davenport:

> " 'What are you going to do?'

He said,

> 'We're going to book him and he will be arraigned tonight.'

I said,

> 'Will there be any examination, any attempt to get any statements from him or any lineups?'

He said,

> 'No, we won't do that.'

I said,

> 'If so, I'll hang around until (N.Y. counsel) shows up, otherwise if it's just going to be a booking and an arraignment, there is no purpose in holding you up, and I have other matters to attend to.'
>
> And he said no there would not. I asked him again if there was going to be any lineup or statements and/or any examinations for identification (H. 166)."

Mr. Brown then testified that he left petitioner in the custody of Assistant District Attorney Davenport and returned to New Jersey (H. 158-167).

Mr. Davenport *did not cross-examine the witness.*

Evidence at Trial

People's Case

Doctor Cerrute testified regarding the serious injuries sustained (T. 32-35). Dr. Cerrute also testified that Harry Bogin was in critical condition for only the first several hours and that his "vital signs very promptly became stable . . . so by the following day . . . or that very evening we were able to transfer him to the Intensive Care Unit" (T. 32-36).

James G. Cleary testified that he was employed by the FBI. He then testified, over objection, that on the morning of March 11, 1971, he received a telephone call from Mrs. Harry Bogin (T. 39-40).

A motion was then made to strike Mr. Cleary's testimony which the court granted on the grounds that it was inadmissible and prejudicial to petitioner (T. 40-42).

Harry Bogin testified that on March 11, 1971, he left his home at 2783 Brighton Eighth Street, at about 7:00 a.m. and went across the street and found his company truck had a flat tire. He went to the rear of the truck, stepped onto the sidewalk and saw a man emerge from a car parked in front of the truck with what ". . . looked like a machine gun" (T. 50-52).

On cross-examination, Bogin testified . . . "it was fairly light out", not raining, no fog or haze. He stated "This was just after I got up in the morning, I'm not fully awake, . . .", that he was functioning and a little sleepy and the morning was clear. That he saw his assailant full-face for under a second. He did not recall if his assailant had a hat on, how the assailant was dressed or whether the man had an overcoat, a jacket or a sweater on (T. 63-80).

Defendant's Case

Priscilla Lodato testified that she was living with petitioner at 74 Garrison Street, Newark, New Jersey for four years. Tremarco was at her home on March 10, 1971, and that he slept there that evening. On March 11, 1971, she and Tremarco awoke at about 7 a.m. and that petitioner showered, shaved, had coffee and left at about 7:30 a.m. After her children left for school, Tremarco returned with some clothes from the cleaners and then left a little after 8 a.m. (T. 84-88).

Aran Ashukain testified that he owns a dry cleaning store at 26 Pacific Street North, Newark, New Jersey. He knew petitioner all his life. After learning that Tremarco was arrested he recalled that Tremarco was in his store on the day of his arrest. Tremarco came to pick up

some dry cleaning at approximately 7:15-7:20 a.m. before his "pressers" who arrive at 7:40-7:50 arrived (T. 98-101).

John Bridges testified that he works as a mechanic at a gas station in Newark and that Tremarco was doing business with the gas station for approximately eight years. Tremarco bought gas between 7:30 and 7:45 a.m., he recalled the boy who normally pumps gas was not at work as yet (T. 117-119).

Walter F. Zeltmann, a consulting meteorologist testified based upon reports of the United States Weather Bureau for the hour of 7:00 a.m. of March 11, 1971, of observations of that date and hour at JFK Airport, La Guardia Airport, and Central Park Observatory and a table of sunrise published by the United States Naval Observatory and a weather map of the northeastern United States, published by the United States Weather Bureau, all of which were trial exhibits.

An exhibit based on observations for JFK Airport showed rain continuously from midnight to 10:00 a.m. of March 11, 1971, and fog and complete cloud cover at 7:00 a.m. a total overcast of cloud (T. 134-140). Sunrise was at 6:15 a.m., temperature was 35 degrees (T. 142).

Observations for La Guardia Airport at 7:00 a.m. on March 11, 1971, described rain, fog and complete overcast (T. 141). Temperature 35 degrees (T. 142).

Observations from Central Park at 7:00 a.m. on March 11, 1971, disclosed rain and fog, however, cloud cover is not measured at Central Park.

The Weather Map disclosed inclement weather from Maine to Delaware (T. 142).

Louis Romeo, testified that he is a fireman for the City of Newark and also owns a restaurant tavern in Newark. He opened his restaurant tavern each day around 5:30 a.m. His restaurant is busy in the morning before 8:00 a.m. but is slow when his customers leave for work around 8:00 a.m. On hursday (March 11, 1971 was a Thursday) he leaves his restaurant around 8:00 a.m. to pick up fish for Friday. He saw Tremarco on his way to pick up the fish. Around 11:00 or 11:30 on the same day someone came into his restaurant and said the police were looking for Tremarco (T. 158-161).

People's Rebuttal

Detective Nacht testified that on Wednesday (September 22, 1971) at the request of the District Attorney he drove from 2783 Brighton Eighth Street in Brooklyn to 74 Garrison Street, Newark, New Jersey. He left Brighton Eighth Street at exactly 6:45 a.m. and arrived at 74 Garrison Street at exactly 7:19 a.m. The trip was 23.8 miles and took 34 minutes (T. 172-173).

On cross-examination the witness testified that the route taken (New Jersey Turnpike) showed signs of new construction but he did not know whether the new approachways were in the process of construction on March 11, 1971. The traffic on the Turnpike on that day was "flowing freely"; traffic was heavier at 7:15 am. than it was at 6:45 a.m.; it was not raining but rather was clear on the day he made the trip; traffic goes slower in the rain and even slower in fog; the route taken skirts the harbor; he did not know whether the New Jersey Turnpike was open or whether Routes 1 and 9 were under construction on March 11, 1971 (T. 175-180).

It was also brought out that the District Attorney had petitioner's bill of particulars claiming alibi from May 28, 1971 (T. 182).

Thereafter, the defense moved to strike the testimony of Detective Nacht regarding the time test on the grounds that there was no proof that the conditions prevailing on the date the test was made (September 22) were the same as those that existed on March 11, 1971. The court stated that the motion was untimely since it was not made when the testimony was offered (T. 196).

The Court then stated:

> "If you had made that motion at that time, I might very well have entertained it, but I am not going to entertain it at the close of the case. . . . You could have made it while he was on the stand. You could have made it right when he left.
>
> Mr. Gillen: Your Honor, it's about three, four minutes ago" (T. 197).

The District Attorney also recognized that the testimony was speculative but refused to join in the motion. The Court, thereafter denied the request to strike (T. 197-198).

ARGUMENT

I

Refusal of the trial Court to compel the production of specific and identifiable records pursuant to petitioner's Subpoena Duces Tecum, even for a limited in-camera inspection by the Court, violated petitioner's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

A. The subpoenaed records should have been produced, since they were specifically identified, and they were vitally material to the defense, as may be gleaned from the facts of the case and the Government's absolute refusal to make them available.

Special Agent Collins of the Federal Bureau of Investigation testified as to making reports of conversations with Harry Bogin, the victim and essentially the only prosecution witness in the trial, pertaining to Bogin's identification of petitioner as his assailant. Agent Collins categorically refused to produce these reports to the defense or to the Court for in-camera inspection. The entire case against petitioner was Bogin's recognition of his assailant with merely an "under a second" opportunity to view the assailant at the scene (H. 55, 90; T. 65, 77).

Harry Bogin's prior statements to the Federal Bureau of Investigation concerning the "under a second" view, for use in cross-examination, were vital. There was no legitimate reason for the refusal to produce them.

In *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462, 95 Law Ed. 1950 (1951) this Court refused to answer the broad question presented by petitioner in the instant case and stated:

> "The constitutionality of the Attorney General's exercise of a determinative power as to whether or on what conditions or subject to what disadvantages to the Government he may refuse to produce government papers under his charge must await a factual situation that requires a ruling." page 469 (U.S. Reports)

In *Ragen* this Court found Department of Justice Order # 3229, the predecessor of 28 CFR 16.11, upon which the production of the instant records were refused, as valid, stating that the production called for in *Ragen* was unlimited and the government employee was not questioned as to his willingness to submit the subpoenaed material to the Court.

Here the production of material called for was limited, identified and the Court did question whether the material would be submitted to it. The Court was refused access to the material under any conditions whatsoever (H. 13 to 19, 224, 380).

At trial the demand for the production of the statements made by Harry Bogin was renewed and denied (T. 46).

It is respectfully submitted that this case presents a ". . . factual situation that requires a ruling." *Touhy* v. *Ragen* (Supra), as to the Attorney General's determinative power to refuse production of Government papers.

B. The prior statements of the sole identifying witness should have been produced pursuant to long established trial practice and procedures.

People v. *Rosario*, 9 N.Y. 2d 286 makes it unmistakably clear that defense counsel must be permitted to examine a witness' prior statements. In reaching that result the New York Court of Appeals stated at page 289-290:

". . . this court is persuaded that a right sense of justice entitles the defense to examine a witness' prior statement, whether or not it varies from his testimony on the stand. As long as the statement relates to the subject matter of the witness' testimony and contains nothing that *must* be kept confidential, defense counsel should be allowed to determine for themselves the use to be made of it on cross-examination. (Cf. U.S. Code, titl. 18, § 3500, 18 U.S.C.A. § 3500).

"A pretrial statement of a witness for the prosecution is valuable not just as a source of contradictions with which to confront him and discredit his trial testimony. Even statements seemingly in harmony with such testimony may contain matter, which will prove helpful on cross-examination. They may reflect a witness' bias, for instance, or otherwise supply the defendant with knowledge essential to the neutralization of the damaging testimony of the witness which might, perhaps, turn the scales in his favor. Shades of meaning, stress, additions or omissions may be found which will place the witness' answers upon direct examination in an entirely different light. As the United States Supreme Court has so well observed, 'Flat contradiction between the witness' testimony and the version of the events given (previously) * * * is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast . . .

"In emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony. *Jencks* v. *United States*, 353 U.S. 657, 667, 77 S.Ct. 1013, supra."

It is clear that the statements taken by the F.B.I. related to the witness Bogin's testimony and that the state-

ments themselves contained nothing that had to be kept confidential since they dealt with the very events that were being testified to at the hearing and trial. The F.B.I. did claim that the F.B.I. reports were confidential but that contention does not satisfy common sense or the mandate of *People* v. *Rosario* and *Touhy* v. *Ragen*.

It is apparent that the non pertinent statements of a witness can be exercised from a confidential F.B.I. report.

Title 18 U.S.C. § 3500, cited with approval by *Rosario*, contains provisions for the Court to inspect the statements *in camera* when a claim is made that it is unrelated. The court must then rule upon the claim, excise unrelated portions, deliver the statement as excised to the defendant and preserve the entire statement for appeal. Section 3500 also contains provisions requiring the court to strike the testimony if the statement is not produced.

Furthermore, the failure to disclose the statement of Harry Bogin constituted a breach of the prosecutor's duty to disclose material evidence favorable to the accused as required by this Court's edict in *Brady* v. *Maryland*, 373 U.S. 83 (1963).

Accordingly, in view of the fact that the entire case rested upon the testimony of a single witness who observed his assailant for "no more than a second" and who gave statements specifically pertaining to this very "no more than a second" observation, and the fact that defense counsel was precluded from effectively cross-examining in the absence of this report, it is urged that justice demands a reviewal of petitioner's conviction with respect to his being denied effective representation of counsel and due process of law.

II

The in-court identification of petitioner should have been excluded. Petitioner had been forced to appear in a "one man line up" or "show up" the day after the assault. The in-court identification was irretrievably tainted.

Convinced of the dangers inherent in eyewitness identification, this court decided the landmark trilogy of *Wade-Gilbert-Stovall* (*United States* v. *Wade*, 388 U.S. 263; *Stovall* v. *Denno*, 388 U.S. 293) and established constitutional and procedural safeguards and sanctions to limit the instances of "wrong man" convictions. See Note 6 of *Wade*, 388 U.S. at 228.

The major and indeed the only effective sanction to prevent convictions of the innocent is to exclude from the trial the in-court identification testimony whenever the constitutional standards of *Wade-Gilbert-Stovall* are violated unless the prosecution can establish by "*clear and convincing evidence*" that the in-court identification testimony, rather than stemming from the unfair pre-trial confrontation, has an "independent source."

Wade and *Gilbert* established the initial constitutional standard that presence of counsel is essential at a lineup to insure the fairness of the identification procedure and to guarantee the effective cross-examination of a witness who makes an identification.

Stovall in setting a second standard recognized that independent of any right to counsel claim, the confrontation could be so unnecessarily suggestive and conducive to irreparable mistaken identification that the defendant was denied due process of law.

Although in *Wade* the suspect was displayed to the witness in handcuffs on the way to the lineup, *Wade* and *Gilbert* are essentially lineup cases. *Stovall* was a show up case and the court noted that such showups have been widely condemned as inherently suggestive since the victim is afforded no alternative choice. *Wade* also in discussing "showups" said that it was difficult to imagine a situation more clearly conveying the suggestion that the person presented is guilty.

A showup, under *Wade* and *Stovall*, can only be justified under "exigent circumstances" where the witness is in imminent danger of death. Accordingly, the New York Courts have almost invariably held "showups" to be violative of due process. *People* v. *Oakley*, 28 N.Y. 2d 309; *People* v. *Hanley*, 27 N.Y. 2d 648; *People* v. *Alston*, 27 N.Y. 2d 822; *People* v. *Rahming*, 26 N.Y. 2d 411.

Simmons v. *United States*, 390 U.S. 377, the sole Supreme Court decision dealing with photo identification set a standard similar to *Stovall* in holding that a conviction based on eyewitness identification at trial following a pre-trial identification by photograph will be set aside if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

Under the facts herein, it cannot be disputed that the petitioner was denied the assistance of counsel and due process when he was subjected to an unnecessarily suggestive showup without a showing of exigent circumstances, immediately following a photo identification which created a likelihood of irreparable misidentification. The facts further demonstrate that petitioner's arrest by the FBI in

New Jersey and his arraignment in Federal Court in New York was a sham worked in collusion with State authorities to avoid extradiction; the petitioner's right to counsel was flagrantly violated when the prosecutor advised defense counsel, at the Federal arraignment, that the petitioner would not be subjected to any lineup or showup; that the photo identification at the hospital when the petitioner was in custody and available for a corporal lineup was unjustified. See *People* v. *Gould*, 54 Cal. 2d 631; *People* v. *Holiday* (Ill. Supp.), 265 N.E. 2d 634; that the showup at the hospital of the defendant in handcuffs at a time when the victim expected his assailant to be brought in was unnecessarily suggestive and conducive to irreparable misidentification; and that there was no showing of exigent circumstances to justify the showup without counsel since counsel was there and executed by the prosecutor, the victim was not in critical condition at the time of the showup, and time was not of the essence since the showup was delayed for approximately two hours.

Thus the trial court held in excluding the out of court identification testimony:

> "The court finds that the identification at the hospital both of the photographs and of the confrontation is tainted and will be suppressed" (H. 408).

This Court should decide, in the facts of this case, whether the prosecution established by "clear and convincing evidence" that the in-court identification, rather than stemming from the unfair pretrial showup and photo display, had an "independent source." *Wade* and *Gilbert*, *supra*; *People* v. *Ballott*, 20 N.Y. 2d 600.

Some of the factors to be considered were described by this Court in *United States* v. *Wade*, 388 U.S. at 241:

> "Application of this test (independent source) in the present contest requires consideration of various factors; for example the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion and the lapse of time between the alleged act and the lineup identification. It is also relevant to consider those facts, which despite the absence of counsel, are disclosed concerning the conduct of the lineup."

The factor most frequently considered by the cases, see *People* v. *Ballott, supra; People* v. *Damon*, 24 N.Y. 2d 256; *People* v. *Harrington*, 29 N.Y. 2d 498; *People* v. *Whitmore*, 28 N.Y. 2d 826 is the opportunity to observe the assailant. Under the facts herein, Bogin testified on direct and cross that he observed his assailant for "under a second" (H. 55, 90; T. 65, 77) during which time he also observed the gun (H. 142). Bogin also admitted that he was a little sleepy (H. 74), did not observe how the assailant was dressed or whether he had a hat on (T. 67). Moreover, the record demonstrates that Bogin was mistaken about the weather conditions which were proven to be rain, overcast, fog and haze at the time of the shooting (T. 134-142).

In addition, the fact that Bogin was shown photos of the defendant prior to the showup (H. 63, 181, 362) is another factor negating independent source. See *People* v.

Martin, 2 Cal. 3d 822, 833, as was the concededly suggestive showup itself (H. 408).

On the other hand, the only evidence supporting "independent source" which was relied upon by the court below in denying the petitioner's motion to exclude the in-court identification was the prior meeting of Bogin and the petitioner in the court in Newark in the latter part of 1969 or the early part of 1970 (H. 79). It is submitted that evidence, especially in view of the fact that Bogin saw petitioner for only a few seconds in court, and was not looking at him during the entire time thereafter, because he had his own problems, was not "clear and convincing evidence" as required by this Court.

The term "clear and convincing evidence" has been defined as "clear, explicit and unequivocal, so clear as to leave no substantial doubt" and "sufficiently strong to command the unhesitating assent of every reasonable mind," *People* v. *Caruso*, 68 Cal. 2d 183.

In-court identification has an "independent source" when the court finds that the identifying witness, by drawing on his memory of the events of the crime has retained such a definite image of the defendant that he is now able, in court, to make an identification without dependence upon or assistance from the tainted pre-trial confrontation and unaffected by any promptings or suggestions where they took place. See *Phipps* v. *Folletti*, 428 F.2d 912 (2d Cir. 1970); *People* v. *Rahming*, 26 N.Y. 2d 411, 422.

Therefore, since the prosecution failed to meet its burden of proof the in-court identification should have been excluded.

III

Petitioner was denied a fair trial by the prosecutor's calculated prejudicial statements completely unsupported by the evidence and by the prosecutor's calling to the stand a witness whose testimony was clearly inadmissible but whose very presence was highly suggestive and prejudicial to petitioner.

A prosecutor,

> " . . . is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."
>
> "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

So spoke this Court in *Berger* v. *United States*, 295 U.S. 78, 88.

This standard is justly a high one and its violation cannot be countenanced. A jury does expect fairness and truth from the prosecutor and will give his words great credence.

In his summation here, with calculation, the prosecutor stated to the jury,

> "Mr. Gillen, (the defense attorney) need one of you —just one—just one juror that says 'no Not Guilty' is a victory for Mr. Gillen" (T. 223).

This statement would lead the jury to believe that it was Mr. Gillen's victory and not the guilt or innocence of the petitioner, Tremarco, that was at stake. By this statement, the prosecutor created in the minds of the individual jurors that if they did have a reasonable doubt about petitioner's guilt or innocence, that they should vote for a guilty verdict regardless of their reasonable doubt in that their holding to the reasonable doubt would only contribute to a lawyer's "victory", disregarding the true issue in the case of the guilt or innocence of a defendant and their duty to abide by their individual findings.

Despite an admonishment by the Court, the prosecutor went on to state:

> " . . . the New York Police would not have performed such a (paraffin) test because they knew who had committed this crime." (T. 224)

This statement in and of itself, is sufficient to warrant a reversal of the jury's verdict as a defendant has a Constitutional guarantee to meet charges in an atmosphere that will guarantee and provide a forum where he will receive a fair and impartial trial before a jury and to face in the courtroom the witnesses against him. The petitioner here is entitled to have the verdict set aside since there is more than just a possibility that these unfair comments influ-

enced the jury in their deliberations and determination. *People* v. *Whitmore*, 257 N.Y.S. 2d 787 (1965).

This statement was calculated to make the jury believe that the New York City Police Department had other evidence, not before the jury, of such overwhelming substance as to preclude any possibility of the defendant's innocence. On the trial record of this case where guilt, if any, could only be founded on a split second observation under unfavorable weather conditions, telling the jury the police knew that petitioner was guilty is unconscionable.

As was said by the Appellate Division in *People* v. *Lombard*, 4 A.D. 2d 666, 168 N.Y.S. 2d 419, 424:

> "Palpably, therefore, the prosecutor's summation was highly prejudicial to (the defendant). The summation cannot be considered within the bounds of proper advocacy. . . . While allowed the wildest latitude by way of comment, denunciation or appeal in advocating his cause, this does not give him any warrant to introduce into his summation matter which the jury has no right to consider in determining the guilt or innocence of the defendant."

Moreover, as was held by the court in *Lombard*, *supra*, although the court attempted to correct the impropriety, neither its instructions nor its admonitions could possibly have cured the prejudice resulting from their commission.

Also, in *People* v. *Tassiello*, 300 N.Y. 425, 91 N.Y. 2d 872 (1950) the Court of Appeals granted a new trial where the prosecutor told the jury that the defendant's lawyer knew he was guilty even though that remark was withdrawn by the prosecutor and corrected by the court. There the court said at pp. 429, 430, 431:

> "Knowing, as we do, that statements, such as those now challenged, addressed to a jury by a prosecuting officer in the trial of a criminal case '* * * are apt to carry much weight against the accused when they should properly carry none', *Berger* v. *United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314; *People* v. *Conrow*, 200 N.Y. 356, 369, 93 N.E. 943, 948, we cannot say, in the circumstances disclosed by this record, that there was erased from the jurors' minds what the prosecutor had said with earnestness on the previous day. Here, as in *People* v. *Levan*, 295 N.Y. 26, 36, 64 N.E. 2d 341, 346, 'The virus thus implanted in the minds of the jury is not so easily extracted.' "

See also: *People* v. *Davis*, 282 App. Div. 962, 125 N.Y.S. 2d 789 where the court held that:

> "The summation of the assistant district attorney to the jury was inflammatory and prejudicial to the defendant. The issues of fact presented for the jury's determination were sharply disputed. Under the circumstances, the interest of justice require that a new trial be had"

and *People* v. *Montanaro*, 70 N.Y.S. 2d 537, where a new trial was ordered where improper and prejudicial matters before the jury, deprived defendant of a fair and impartial trial.

The prejudice of this summation was compounded by the prosecutor calling as a witness an employee of the Federal Bureau of Investigation. The mere presence of an FBI employee brought home to the jury not only what the New York Police "knew" but what the FBI knew.

James G. Cleary testified he was a complaint clerk employed by the FBI and that on March 11, 1971 he received

a telephone call from a woman who stated she was Mrs. Harry Bogin. This testimony was completely irrelevant to the issues on trial and adduced solely to unfairly prejudice the petitioner by implanting in the jurors' minds an inference that the F.B.I. had an interest in the State proceeding. (T. 39-41).

As was held by the court in *People* v. *Burley*, 282 App. Div. 408, 122 N.Y.S. 2d 760, where, as here, the question of a defendant's guilt is very close, great care should be taken not to introduce into trial any extraneous facts or issues tending to create a prejudice against the defendant. A defendant is entitled to a trial on evidence proving or tending to prove the crime charged uninfluenced by irrelevant facts and circumstances tending to rejudice or mislead a jury. See also *People* v. *Tassiello, supra.*

Even though the court granted the defendant's motion to strike this testimony (T. 41) and instructed the jury to disregard it, "the virus thus implanted in the minds of the jury is not so easily extracted" *People* v. *Levan*, 295 N.Y. 26, 36. Therefore, the cumulatively prejudicial attempts by the prosecutor to get improper evidence before the jury, including, the statements that the police knew the defendant was guilty, that Mr. Gillen, defense attorney, needed only one juror for a victory, as well as the inadmissible testimony of the F.B.I. employee denied the petitioner a fair trial. Accordingly, in the interest of justice this Court should review petitioner's conviction. *Berger* v. *United States, supra; People* v. *Carborano*, 301 N.Y. 39; *People* v. *Tassiello*, 300 N.Y. 425.

CONCLUSION

For the reasons stated above, petitioner's rights under the Constitution of the United States were violated. The judgment of the New York Court of Appeals should be reversed. Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Brooklyn, New York 11201

GRUNEWALD, TURK & GILLEN
Of Counsel

APPENDIX A

Order on Appeal from Judgment of Conviction

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on May 30, 1972

HON. M. HENRY MARTUSCELLO
Acting Presiding Justice
HON. HENRY J. LATHAM
HON. FRANK A. GULOTTA
HON. MARCUS G. CHRIST
HON. A. DAVID BENJAMIN
Associate Justices

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

v.

JOSEPH TREMARCO,
Appellant.

In the above entitled action, the above named Joseph Tremarco, defendant in this action, having appealed to this court from a judgment of the Supreme Court, Kings County, rendered December 17, 1971; and the said appeal having been argued by Michael J. Gillen, Esq., of counsel for the appellant, and by Helman R. Brook, Esq., of counsel for

the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed.

ENTER:

Irving N. Selkin (illegible)
Clerk of the Appellate Division

APPENDIX B

Certificate Denying Leave

STATE OF NEW YORK

COURT OF APPEALS

Before:

HON. JOHN F. SCILEPPI,

Associate Judge.

THE PEOPLE OF THE STATE OF NEW YORK

against

JOSEPH TREMARCO,

Appellant.

I, JOHN F. SCILEPPI, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated: Kew Gardens, New York
June 29, 1972

JOHN F. SCILEPPI
Associate Judge

---

* Description of Order: Appellate Division, Second Department, order

APPENDIX C

Code of Federal Regulations
28 CFR 16.11

§ 16.11 Purpose and scope.

This subpart contains the regulations of the Department of Justice concerning procedures to be followed when a subpoena, order, or other demand (hereinafter in this subpart referred to as a "demand") of a court or other authority is issued for the production or disclosure of (a) any material contained in the files of the Department, (b) any information relating to material contained in the files of the Department, or (c) any information or material acquired by any person while such person was an employee of the Department as a part of the performance of his official duties or because of his official status. For the purposes of this subpart, the term "employee of the Department" includes all officers and employees of the United States appointed by, or subject to the supervision, jurisdiction, or control of, the Attorney General of the United States, including U.S. attorneys, U.S. marshals, and members of the staffs of those officials.

§ 16.12 Production prohibited unless approved by the Attorney General.

No employee or former employee of the Department of Justice shall, in response to a demand of a court or other authority, produce any material contained in the files of the Department of Justice or disclose any information relating to material contained in the files of the Department of Justice or disclose any information or produce any mate-

rial acquired as a part of the performance of his official duties or because of his official status without the prior approval of the Attorney General.

§ 16.13 Procedure in the event of a demand for production or disclosure.

(a) Whenever a demand is made upon an employee or former employee of the Department of Justice for the production of material or the disclosure of information described in § 16.11, he shall immediately notify the Attorney General and the U.S. attorney for the district where the issuing court or other authority is located. The U.S. attorney shall immediately request instructions from the Attorney General. If possible, the Attorney General shall be notified before the employee or former employee concerned replies to or appears before the court or other authority.

(b) If response to the demand is required before the instructions from the Attorney General are received, the U.S. attorney or other attorney as may be designated for the purpose, shall appear with the employee or former employee of the Department upon whom the demand has been made, and shall furnish the court or other authority with a copy of the regulations contained in this subpart and inform the court or other authority that the demand has been or is being, as the case may be, referred for the prompt consideration of the Attorney General. The court or other authority shall be requested respectfully to stay the demand pending receipt of the requested instructions from the Attorney General.

§ 16.14 Procedure in the event of an adverse ruling.

If the court or other authority declines to stay the effect of the demand in response to a request made in accordance with § 16.13(b) pending receipt of instructions from the Attorney General, or if the court or other authority rules that the demand must be complied with irrespective of the instructions from the Attorney General not to produce the material or disclose the information sought, the employee or former employee upon whom the demand has been made shall respectfully decline to comply with the demand (United States ex rel Touhy v. Ragen, 340 U.S. 462).

FREE COPY

SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-[illegible]

JOSEPH TREMARCO,

Petitioner,

—v—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-499

JOSEPH TIEMARCO,

Petitioner,

—v—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement and Synopsis of Previous Proceedings

Petitioner alleges that he is seeking a writ of certiorari to review "the judgment of the Court of Appeals for the State of New York" entered June 29, 1972. However, petitioner's application for leave to appeal to the Court of Appeals of the State of New York was denied June 29, 1972. The highest appellate court which heard this case, and affirmed the conviction, was the Supreme Court of the State of New York, Appellate Division, Second Department. The affirmance was without opinion, the order being entered May 30, 1972.

The petitioner was convicted on December 17, 1971, after a trial by jury, of the crimes of Attempted Murder, Assault in the First Degree, and Possession of a Dangerous Weapon, a felony. Petitioner was sentenced to be committed to the

New York State Department of Correctional Service for a maximum of twenty-five years on the Attempted Murder, a maximum of ten years on the Assault in the First Degree, and a maximum of four years on the Possession of a Weapon, all sentences to run concurrently.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court pursuant to the provisions of 28 USC 1254(1) and 28 USC 1257(3). Your respondents note that 28 USC 1254(1) is inapplicable in that it deals with petitions to review decisions of federal courts of appeals. The jurisdiction of this Court is properly sought under 28 USC 1257(3) in that petitioner is claiming that the rights, privileges and immunities afforded him by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution have been abridged.

History of the Case

By Kings County Indictment No. 2164/1971, the petitioner was charged with the crimes of Attempted Murder, Assault in the First Degree, and Possession of a Weapon as a felony. The charges all arose from the machine gun assault committed upon one Harry Bogin on March 11, 1971.

The petitioner was tried before a jury, the trial commencing on September 15, 1971, and continuing until a verdict of guilty was rendered on September 28, 1971.

Sentence was imposed on December 17, 1971. The conviction was affirmed by the Supreme Court of the State of New York, Appellate Division, Second Department, on May 30, 1972. Leave to appeal to the Court of Appeals of the State of New York was denied on June 29, 1972.

Statement of Facts

The Wade Hearing

Prior to trial, petitioner sought a "*Wade*-type" hearing. The evidence adduced at the hearing is summarized as follows:

HARRY BOGIN lives at 2783 Brighton 8th Street, Brooklyn. On March 11, 1970, he arose at approximately 6:30 or 6:45 (A37)* and left his house at about 7:00 or 7:10 a.m. (A38). He started to walk across the street to where his company truck was parked. It had a flat tire (A38). As he started to walk towards the back of the truck, he saw "a gentlemen who I recognized" carrying a gun (A39). Bogin recognized the man "as soon as he came out of the car" (A39). Bogin shouted "No," started to run and heard gun fire. The next thing he knew, he was across the street, lying on the ground (A40).

Bogin saw the man in "a full view of his face" for "no more than a second" (A40). He recognized the man from Federal Court in New Jersey (A40). Bogin first saw this man when his name was called by the Federal Court (A42), as he and the man were co-defendants in a case in that court (A43). The name of the man is Joseph Tremarco (A43). While in Federal Court, Bogin looked at Tremarco as he, Tremarco, was returning from the bench and walking out of the courtroom (A44).

Later, after Bogin was called before the court, he went into a fingerprint and "mug shot" room. Several people

---

* References are to the Petitioner's appendix, submitted on the appeal to the Supreme Court of the State of New York, Appellate Division, Second Department.

were there, among them Tremarco (A45). During this time, Tremarco was sitting on a couch, and Bogin was near the door, approximately ten or twelve feet away (A45-46). Possibly ten or fifteen minutes elapsed, during which Bogin looked at Tremarco (A46). Later, Bogin was sitting on the couch and Tremarco was sitting in a chair. Again, Bogin had occasion to look at Tremarco (A46).

Still later, as Tremarco was being photographed, Bogin looked at him full face (A46). The two men were in the room about twenty minutes to one-half of an hour (A47). The lighting conditions in the room were "a little bit better" than in the New York Supreme Court courtroom (A47).

On March 12, 1971, Bogin was in Coney Island Hospital. Assistant District Attorney Davenport came in and said that he was bringing in someone for Bogin to look at (A48). Two people then came in with Tremarco. After they walked out, Bogin said that "that was the man that shot me" (A48).

Bogin also recalled that Agent Collins had shown him photos of many people, about four or five of which he recognized (A48-49). Of that group, Bogin recognized Tremarco (A49).

After being shot, Bogin crawled into his house and collapsed on the kitchen floor. He told his wife to call an ambulance and the FBI. He also told his wife he had been shot by Tremarco (A49). Bogin also had a conversation with a New York City policeman, but his recollection of this was vague, due to his condition (A49). He thought he told the officer that Tremarco shot him (A50).

On cross-examination, Mr. Bogin again stated that he saw a man coming towards him from the rear of a car

Statement of Facts

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On March 12, 1971, Bogin was in Coney Island Hospital. Assistant District Attorney Davenport came in and said that he was bringing in someone for Bogin to look at (A48). Two people then came in with Tremarco. After they walked out, Bogin said that "that was the man that shot me" (A48).

Bogin also recalled that Agent Collins had shown him photos of many people, about four or five of which he recognized (A48-49). Of that group, Bogin recognized Tremarco (A49).

After being shot, Bogin crawled into his house and collapsed on the kitchen floor. He told his wife to call an ambulance and the FBI. He also told his wife he had been shot by Tremarco (A49). Bogin also had a conversation with a New York City policeman, but his recollection of this was vague, due to his condition (A49). He thought he told the officer that Tremarco shot him (A50).

On cross-examination, Mr. Bogin again stated that he saw a man coming towards him from the rear of a car

(A61). He recognized the gun held by this man as a submachine gun (A62). Mr. Bogin has 20/20 vision, his last eye examination having taken place a year or two previous (A63).

The court appearance at which Bogin had seen Tremarco took place at the end of 1969 or early 1970 (A64) or at the end of 1970 or early 1971 (A112).

After being shot, Bogin made his way back to his house "with a full head of steam" (A77). He told his wife to call the FBI, and an ambulance, and that "Tremarco had shot me" (A78). The name Tremarco "flared" in Bogin's mind when he first saw him (A79).

When shown photographs at the hospital, Bogin picked Tremarco, and another man who resembled him. The second man was also named Tremarco (A90). Tremarco was brought into Bogin's hospital room; he was handcuffed at this time (A93). When Tremarco was brought in, Bogin fully expected the man who was brought was the man who shot him because he "had identified this person pretty fully" (A99).

Harry Bogin identified the appellant, in court, as the man who had shot him (A113).

RAYMOND A. BROWN was called as a witness for the petitioner (A122). Mr. Brown is a New Jersey attorney, familiar with criminal cases (A123). On March 12, 1971, at approximately 8:00 a.m., Mr. Brown was informed by one Myron Mauer that the appellant had been arrested (A124). The Federal Magistrate in Newark told Brown that Tremarco was to be arraigned on a federal obstruction of justice charge in Brooklyn (A125-126). Mr. Brown

went to Brooklyn where he encountered Assistant District Attorney Davenport, who informed him that Tremarco would be booked on the Kings County charges and that no attempts would be undertaken to secure statements or place the petitioner in a lineup (A132). Mr. Brown then left Brooklyn to return to Newark (A133).

GERALD COLLINS of the Federal Bureau of Investigation was called as a witness for the People (A134). He picked up Tremarco in Newark on March 12, 1971, and took him to the Federal Court in Brooklyn for arraignment on an obstruction of justice charge (A134). Previously, he had spoken with Harry Bogin who had told him that Joseph Tremarco had shot him (A135). He had shown Bogin 48 photographs and, for the group, Bogin selected Tremarco (A136). He also selected a photograph of Tremarco's brother and stated "I can't be sure. I think I have seen this man before" (A137).

As to the obstruction of justice charge, it was presented to a federal grand jury but no indictment had been voted by the day of Mr. Collins' testimony, September 16, 1971 (A140).

After his federal arraignment, Tremarco was released in his own recognizance and was immediately taken into custody by New York City police officers (A159).

Bogin selected Tremarco's photograph, without hesitation, as the individual who shot him (160). He also selected the photos of Dominic Tremarco and Hugo Ernest Colosanti and stated that he may have seen them in the past (A161). When selecting appellant's photograph, however, Bogin stated "That's him, that's the one" or words to that effect (A164).

PATROLMAN RAYMOND BINI testified that, while on duty on March 11, 1971, he had occasion to go to 2883 Brighton Eighth Street, Brooklyn (A173). He proceeded to the upstairs apartment where he was told by an injured man that he had been shot by a man named "John Tremarco" (A174).

MARK MARTIN STEINBERG testified that he lives at 2798 Brighton Eighth Street, Brooklyn. On March 11, 1971, while getting dressed, he heard "rapid fire noise" (A182). Upon looking out of the window, he saw Harry Bogin running from the street towards his (Bogin's) house (A183). Steinberg went to his neighbor's house. Bogin told him he had been shot by a man "who hit the FBI officer in a case he was involved with previously" (A184). He said the man was "Joe Tommico, Timco, Temarco" (A185). Bogin said "Tremarco" while on the kitchen floor (A193).

At the time Steinberg heard the firing noises, it was light out, on a clear morning, with no fog, smoke or haze (A189).

EDWARD JOHN BOYD V, called as a witness for petitioner, is an Assistant United States Attorney and testified that he is the prosecutor in charge of a federal case against Joseph Tremarco (A220). Boyd's information that it was Tremarco who had shot Bogin came from Detective Nacht (A224). Boyd was told that Tremarco was to be arraigned in Brooklyn, because no magistrate was sitting in Newark (A231). Under the circumstances of this case, the crowded detention facilities and the fact that local officers were to arrest Tremarco immediately, it was not unusual to release Tremarco without bail being posted (A234).

DETECTIVE IRWIN NACHT was called as a witness for the People. He is the officer charged with the responsibility of investigating the shooting of Harry Bogin (A246). Upon

inquiring of Bogin as to who had shot him, Nacht was informed "John Tremarco. I got locked up with him in a Jersey case" (A243).

The first officer on the scene, Patrolman Bini, had filed a report stating "an unknown person did shoot with a, gun causing serious injury" (A252).

Detective Nacht accompanied Tremarco into Bogin's hospital room. Bogin said nothing. After leaving the room, Nacht learned Bogin had stated "that's the man" (A285). Bogin told Nacht that he had seen Tremarco previously when he was being "booked" or "arrested" (A288).

HARRY BOGIN was recalled (A311). He confirmed that his appearance in New Jersey Federal Court was in late 1970 or early 1971 (A311).

The Court ruled as follows on the motion to suppress the photograph identification and showup:

> "The Court finds under these circumstances, the identification was suggestive and violative of his constitutional rights.
>
> The exhibition of the photographs, in my opinion, constitutes a line-up. Mr. Brown's presence was required in accordance with the due process clause of the Constitution, and the failure of Mr. Brown to be present comes within People v. Wade. (sic)
>
> The Court finds that the identification at the hospital, both of the photographs and of the confrontation, is tainted and will be suppressed." (A330)

Petitioner then moved to suppress any in-court identification as being tainted by the photograph identification and the showup. This the Court quite resoundingly refused to

do, stating that as to a taint, "[t]he Court is in complete disagreement with you (Mr. Gillen) on that account" (A330). The court stated further:

> "You can't get around one thing that Harry Bogin testified that he was a co-defendant with Mr. Tremarco in Newark, that he was in his company approximately three months prior to March 11, 1971, and that when the name of Tremarco was called out as a co-defendant he noticed him, and that subsequently they went downstairs to a room so that they could be photographed and possibly fingerprinted, and he was in his company at least a half hour. I think his testimony was twenty minutes or thirty minutes or forty minutes, something like that. So that he had time to look at him, to study him. This wasn't a casual acquaintance, this was a person who was a co-defendant in the case.
>
> Subsequent to that, Mr. Bogin testified before me in this hearing that when he put his foot on that sidewalk and looked up, and he saw a man with a machine gun in his hands, he yelled out, 'Oh, no,' and he saw him for a second or so, and he, without any hesitation, said that was the man who was the co-defendant with him, Joseph Tremarco, and there is no taint as to that identification." (A331-332).

The Trial

The People's Case

DOCTOR MARCIAL CERRUTI testified as to the various injuries Harry Bogin received and the medication required as a result of his injuries incurred March 11, 1971 (A373-383). As a result of his wounds, Bogin was in critical condition for several hours and was kept in the intensive care unit for five to seven days (A381).

POINT I

The trial court properly quashed the subpoenas requesting the production of statements made to agents of the Federal Government.

Petitioner contends that his inability to review statements made by Harry Bogin to Agent Collins of the Federal Bureau of Investigation precluded his effective examination of the witness. It must be noted that the Assistant District Attorney prosecuting this case was not allowed to review the F.B.I. files in question (A290, A294). Therefore, in reviewing these reports, neither counsel for the defendant nor counsel for the People were permitted inspection.

Petitioner's counsel subjected Harry Bogin to exhaustive cross-examination. This fact alone does not answer his contention that he has been precluded from effectively cross-examining in the absence of this report. However, we submit, the law is clear that the court below was powerless to compel the production of evidence in the possession of the Department of Justice. In *Jencks v. United States*, 353 U.S. 657, the Supreme Court recognized that pre-trial statements of a prosecution witness are a vital tool for the defense. The decision in *Jencks* became the basis for 18 U.S.C. 3500, the law expressly denominated "the Jencks Act". This act requires that in a federal prosecution, after

[illegible] the witness to disclose the F.B.I. material [illegible] *Brady* [illegible] 83 [illegible] *Brady* [illegible] the production of evidence favorable [illegible] the prosecution [illegible] of an [illegible] to the guilt of the defendant has been suppressed [illegible] the prosecution sought was not in the [illegible]

a witness has been called by the United States and has given testimony on direct examination, the Court shall, on motion of the defense, order the United States to produce any statement of the witness in the possession of the United States relating to the subject matter of his testimony, for use in cross-examination.

Although the New York State Court of Appeals in *People* v. *Rosario*, 9 N Y 2d 286, expresses the desire that the *Jencks* rule and "Jencks Act" be applicable to state prosecutions wherever feasible, we submit that this stated desire is that and no more. It is not a statement of law.

Although there is a paucity of cases in New York dealing directly with this issue, there are cases in other jurisdictions which lend persuasive support to the People's position that the court below was powerless to order the production of the F.B.I.'s file. In *People* v. *Parham*, 30 Cal. Rptr. 268 (Cal. App. 1963), the Court therein faced a similar situation. The Court noted that the trial court "was powerless to enforce obedience to the subpoena served upon Agent Buchanan. The latter's refusal to comply was based on executive order no. 3229 (revised) of the Attorney General of the United States. . . ." *People* v. *Parham* was vacated on other grounds, by the Supreme Court of California. In a decision by Traynor, J., the court noted, however, that *Jencks* v. *United States*, *supra*, and the "Jencks Act" apply only to Federal prosecutions. 60 Cal. 2d 378, 33 Cal. Rptr. 497, 384 P.2d 1001, 1002-3 (1963), cert. denied 377 U.S. 945 (1964), reh. denied 379 U.S. 873. See also *State* v. *Smith*, 431 S.W. 2d 74, 81 (Mo. 1968); *Sanders* v. *State*, 179 So. 2d 35 (Ala. 1965); *State* v. *Page*, 244 A. 2d 258 (R.I. 1968); *State* v. *Masarenas*, 451 P. 2d 567 (N.M.

1968), reversed on other grounds 458 P. 2d 789; *People* v. *Bellanca*, 173 N.W. 2d 754 (Mich. 1970).*

Faced with a somewhat similar situation to the one at issue here, the New York Court of Appeals affirmed a conviction despite appellant's argument that he was denied access to notes made by Federal agents which notes served as the basis for affidavits supporting the search warrant which produced the evidence used as the basis of the prosecution. The Court examined one of the agents in chambers without defense counsel being present and concluded that the notes contained matters which required confidentiality. The Court also denied a defense motion to examine the agent as to whether the notes could be redacted (*People* v. *Rossi*, 30 N Y 2d 936).

Accordingly, it is submitted that the court below acted properly in quashing petitioner's subpoena directed toward the production of statements in the possession of Agent Collins. It was powerless to do otherwise. There has been no error.

POINT II

The trial court properly concluded that the in-court identification of the petitioner was based upon an independent, untainted source and consequently, was admissible.

We agree with petitioner that the only question in this case is "whether the prosecution established by 'clear and convincing evidence' that the in-court identification, rather

* The validity of executive order number 3229 was upheld in *United States ex rel. Touhey* v. *Ragen*, 340 U.S. 462.

than stemming from the unfair pre-trial showup and photo display, had an 'independent source' " (Petitioner's brief, p. 21). The trial court concluded that despite the unfair pretrial identification procedures, an in-court identification was permissable because the defendant was known to the victim prior to the shooting (A331-332).

We submit that without question, the identification of Joseph Tremarco was based upon the fact that Harry Bogin recognized him immediately as the man known to him as a co-defendant in an unrelated case. Because of the prior familiarity of the two men, this case is completely unrelated to those identity cases where arrests and prosecutions follow show-ups and line-ups in which the victim's only prior confrontation with the defendant is the criminal incident charged. In those cases, an erroneous identification is a distinct possibility and accordingly, is of great concern to the courts. In the case at bar, we submit there is no possibility of a mistaken identification. In *United States ex rel. Phipps* v. *Follette*, 248 F. 2d 912, the Court at page 915 declared that for a court determining whether to allow an in-court identification:

> "The effort must be to determine whether, before the imprint arising from the unlawful identification procedure, there was already a definite image in the witness' mind that he is able to rely on at trial without much, if any, assistance from its successors."

Obviously, where an identification precedes any line-up or show-up and the latter merely confirms the former, it cannot be argued that an in-court identification is based in fact upon the latter. In this regard, the language in *Simmons* v. *United States*, 390 U.S. 377, 384, that photo identification may spare "innocent suspects the ignominy of

arrest by allowing eye witnesses to exonerate them through scrutiny of photographs" becomes quite meaningful. The prosecution of the petitioner in this case proceeded because his *identity was confirmed, not established by the photo display and show-up.*

An in-court identification is allowed despite any tainted pre-trial procedures if the in-court identification is based upon an untainted source independent of the suggestive circumstances of photographs or show-up (*United States* v. *Wade*, 388 U.S. 218, 241; *People* v. *Ballott*, 20 N Y 2d 600, 606; *People* v. *Logan*, 25 N Y 2d 184, 192; *People* v. *Hanley*, 27 N Y 2d 648; *People* v. *Alston*, 27 N Y 2d 822). Independent source was defined by Judge Bergan of the New York Court of Appeals, in his dissent in *People* v. *Rahming*, 26 N Y 2d 411, 425, to mean "nothing other than that the witness is able to make the identification at the trial, drawing on his own memory, not effected by the promptings or suggestions of what he saw at the police show up." In this regard, the trial court found that the petitioner was known to Harry Bogin and that the two had been in one anothers company for at least a half an hour only three months prior to the incident charged. He further concluded that this was not a "casual acquaintance" and that at the time of the assault upon him, Harry Bogin recognized his assailant "without any hesitation and that there is no taint as to that identification" (A331-332). We submit, therefore, that "from the total circumstances the identification by the witness was reliable and had an untainted source independent of the suggestive exhibition or 'show up'" (*People* v. *Oakley*, 28 N Y 2d 311, 312).*

* *People* v. *Oakley* is the only New York case found by this writer in which the identifying witness recognized the defendant as a person known to him by prior course of dealing.

Accordingly, we submit that the evidence clearly and convincingly established beyond any doubt whatsoever that Harry Bogin identified the petitioner in-court as the man he recognized on March 11, 1971.

POINT III

Petitioner was not deprived of a fair trial by comments made in the prosecutor's summation, nor by the brief appearance of a witness whose testimony was stricken from the record.

Petitioner asserts that two statements made by the Assistant District Attorney were so prejudicial that the defendant was denied a fair trial. We respond that the statements in question, although not models of forensic advocacy, are not, when viewed in the context of the trial and balanced with the instructions of the court and its charge, so prejudicial as to deny the petitioner the fair trial to which he is entitled and which, we submit, he received.

The initial statement was "Mr. Gillen only needs one of you—just one—just one juror that says, 'No, Not Guilty, is a victory for Mr. Gillen' " (A 570). Mr. Gillen objected stating "I must respectfully submit that the question of victory for Mr. Gillen means nothing here" (A 570). The Court sustained the objection with the admonishment, "Let's comment upon the evidence and stay within the evidence and those inferences that can be drawn. That's what summation is supposed to be. Nothing else but that" (A 570-571). The jury was properly charged as to the requirement of a unanimous verdict (606-607), and also as to the consideration to be afforded the summation of counsel (604-605). "Our theory of trial relies upon the

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ability of the jury to follow instructions" (*Opper* v. *United States*, 348 U.S. 84). We submit therefore that it is simply fanciful to allege that a jury could regard its task in terms of a victory for the attorneys involved.

The second remark was that "the New York police would not have performed such a test (paraffin) because they knew who had committed this crime" (A 571). The jury was promptly admonished to disregard this statement because "that's speculation" (A 571). We submit that when viewed in the context of the testimony and when balanced against the court's instructions, any prejudice which might have emanated from this remark was rendered harmless. Criminal Procedure Law § 470-05 See also *Chapman* v. *California*, 386 U.S. 18: *Harrington* v. *California*, 395 U.S. 250 discussing harmless error of constitutional dimension.

We note initially that the testimony concerning paraffin tests had been elicited by petitioner in his cross-examination of Detective Nacht, inquiring whether a paraffin test had been done (A 529-530). Detective Nacht responded by stating that although there is such a thing as a paraffin test, it is not used by the New York City Police Department.* Thus, the prosecutor was responding in his summation to a false issue injected into the record by the defendant. This is not unlike the situation in *People* v. *Anthony*, 24 N Y 2d 696 where the prosecutor in summation vouched for the "greatness and veracity" of his police witnesses after they had been attacked by defendant's counsel in his closing argument. The Court commented at page 704:

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* Indeed paraffin tests have been found to be inherently unreliable and hence inadmissible in criminal trial. *Brooke* v. *People*, 339 P. 2d 993; *Henson* v. *State*, 159 Tex. Cr. 647.

> "If the issue as to the character and veracity of the police witnesses had a source, it is readily to be found above (in the summation of the defendant's counsel) and any prejudice to defendant Anthony in the prosecution's attempt to offset this doggerel was of defendant's own making".

No standard test had been devised to determine whether or not a remark in summation is proper or improper or whether, if improper it so prejudices a defendant that he is denied a fair trial. Each case involving a charge of prejudice must be scrutinized individually.

The decision in each case as to whether the trial was fair or unfair, whether the error was harmless or prejudicial must of necessity depend upon the nature of the proof adduced and upon the type of error committed, *People* v. *Carborano*, 301 N.Y. 38.

In cases where the proof of the defendant's guilt is clear and convincing, courts have consistently found that a prosecutor's momentary slip of tongue and lack of elegance in advocacy does not constitute reversible error. In *People* v. *Wade*, 23 A.D. 2d 893, the prosecutor characterized the defendant as a "bum" and also indulged in "unwarranted criticism of defense counsel's conduct of the trial." Nevertheless the court held that the proof of defendant's guilt was clear and convincing and under all the circumstances disclosed by this record we find that such improprieties were not material; they did not affect the result or deprive defendant of a fair trial." See also *People* v. *Wollmer*, 274 A.D. 1011.

The New York Court of Appeals has just recently affirmed a conviction for possession of gambling records and

promoting gambling, despite reference in summation to organized crime, the effect of gambling operations on the poor and disadvantaged and the amount of money allegedly made by the defendant in gambling activities. *People* v. *DiPaolo* 30 N.Y. 2d 962.

In *People* v. *Ruberto*, 13 A.D. 2d 944, the prosecutor stated in effect that he himself believed what he was asking the jury to believe and that "we know the defendant was in on this." The court held "we believe the proof of guilt to be palpable and that under § 542 of the Code of Criminal Procedure* the prosecutor's improper remarks in this summation—we find only two such remarks—do not preclude affirmance."

The remarks of the prosecution in the case at bar cannot be equated with the prejudice found in *People* v. *Lombard*, 4 A.D. 2d 666 and *People* v. *Tanzella*, 300 N.Y. 425, relied upon by appellant. In *Lombard*, *supra* the conviction was reversed because a confession of a co-defendant was admitted against Lombard, and the court ruled that "[i]n view of the limited character of the evidence of DeGennaro's confession, the safeguards which the law throws about its use against Lombard were completely dissipated by the arguments which the District Attorney advanced in his summation with reference to the contents of the confession and DeGennaro's admission." The case against DeGennaro was established by his own admission at trial. The prosecutor in summation repeatedly referred to the confession and admissions of the obviously guilty co-defendant which implicated Lombard. This the Court of Appeals found to be prejudicial error.

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* Now Criminal Procedure Law § 470.05 [1].